TORT AND ILLEGALITY: THE *EX TURPI CAUSA* DEFENCE IN NEGLIGENCE LAW (Part One)

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[*The effect of a plaintiff's own unlawful conduct upon his right to compensation at law is an issue confused by the failure of the courts to enunciate the policy grounds behind their decisions. In negligence actions the duty of care has been used as a convenient, although unsatisfactory, means of explanation. In this, the first of two articles, the author establishes the problem areas underlying his examination of the application of the maxim* ex turpi causa non oritur actio *to claims in negligence.*]

1. DUTY OF CARE AND UNLAWFUL CONDUCT

Recent years have seen several instances of courts in both Australia and Canada being called upon to determine the effect of a plaintiff's unlawful conduct upon his right to maintain an action for damages in negligence.[1] On some of these occasions suits for negligently inflicted injury have failed because the harm which the plaintiff suffered was associated in some way with his own unlawful behaviour.[2] The refusal by the courts to recognise a right of action in those cases has produced much debate as to whether or not they are to be explained as illustrations of the application, to the law of tort, of the public policy principles embodied in the maxim *ex turpi causa non oritur actio.*

Does Anglo-Australian Tort law recognise a public policy based defence of 'illegality' and, if so, what is the nature and scope of that defence to actions in negligence? Which particular principles of public policy might underlie the defence and what distinguishes it from other more commonly pleaded and better recognised defences in the law of tort? Finally, why

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[1] Many of these have been discussed previously in Crago, 'The Defence of Illegality in Negligence Actions' (1964) 4 *Melbourne University Law Review* 534, and Fridman, 'The wrongdoing plaintiff' (1972) 18 *McGill Law Journal* 275.

[2] For instance: *Godbolt v. Fittock* [1963] N.S.W.R. 22, *Bondarenko v. Sommers* [1968] S.R. (N.S.W.) 269, *Smith v. Jenkins* (1970) 119 C.L.R. 397, *Tomlinson v. Harrison et al.* 24 D.L.R. (3d) 26, *Tallow et al. v. Tailfeathers et al.* 44 D.L.R. (3d) 55.

should the issue itself have so recently and so suddenly come into prominence, particularly in Australia and Canada? It is to an examination of these questions that this paper is directed.

(i) *Smith v. Jenkins*

At one level the reason for the attention so recently attracted by the defence of illegality is, in Australia at least, easily explained. In 1970 the High Court delivered judgment in *Smith v. Jenkins*.[3] Since that case turned upon the effect of a plaintiff's unlawful conduct on his right to maintain an action for negligently inflicted injury it brought squarely into focus, at the highest Australian appellate level, the very problem which had been confronted by several State Supreme Courts, with varying degrees of success, over the previous decade.

In arriving at its decision the High Court took the opportunity of reviewing all the then existing Australian (and Canadian) case law on the matter. More importantly it failed to take the opportunity to concentrate and clarify the real policy issues which had threatened to become obscured beneath a morass of unsatisfactory legal analysis. That the court failed to do so is less interesting than the form its failure took. Seven years later *Smith v. Jenkins* remains the most appropriate starting point in any discussion of the illegality defence as it applies in Australia.[4]

The facts of that case were as follows:[5] The plaintiff and defendant, both adolescents, were parties to the unlawful use of a motor vehicle, the keys to which along with a small sum of money, they had forcibly acquired from the rightful owner in a public lavatory. During the course of using the stolen vehicle the plaintiff/passenger was seriously injured. The evidence showed that his injury had been directly brought about by the grossly negligent driving of the defendant. In respect of these offences the plaintiff had already been found guilty of the crime of robbery with violence and of illegally using a motor vehicle.

One of the most striking features of the judgments in *Smith v. Jenkins* is the extent of the attention they gave to how the court should approach the problem with which it was faced. Essentially the choice was between a refusal of the law to erect a duty of care between persons participating in the performance of a criminal act and 'a refusal of the courts, upon the grounds of public policy, to lend their assistance to the recovery of damages for breach in those circumstances of a duty of care owed by one to the other because of the criminally illegal nature of the act out of

[3] (1970) 119 C.L.R. 397.

[4] Three other Australian cases dealing with the illegality defence have been reported since *Smith v. Jenkins*. They are: *Matthews v. McCullock* [1973] 2 N.S.W. L.R. 331, *Shillabeer v. Koehn* [1975] 11 S.A.S.R. 397, *Craft v. Stocks and Parks (Building) Pty Ltd and Progress and Properties Ltd* [1975] 2 N.S.W.L.R. 156. (The parties have lodged an Appeal to the High Court.) The latter case appeared too late to be fully considered in part 1 of this article.

[5] The fullest account appears in *Jenkins v. Smith* [1969] V.R. 267.

which the harm arose'.[6] Barwick C.J. spoke for the court when he confessed that it was a question which had considerably exercised his mind.[7]

The court could either have barred a remedy or denied the existence of a cause of action by denying a duty of care. All the judges in fact chose to deny liability by refusing to recognise a duty of care in the particular circumstances.[8] All took the opportunity to explicitly disapprove of the 'privative' public policy formulation by which a right of action is given and then taken away.[9] But the repeated and lengthy discussion devoted to the distinction suggests that some importance attaches to it, and this calls for a preliminary examination of the role of the duty concept in negligence.

(ii) *Duty of Care in Negligence*[10]

In the theory of tort law the negligence issue comprises three elements: a duty of care, breach of that duty, and resulting damage. The defendant must owe the plaintiff a duty to take care. He must then be shown to have breached that duty of care. Finally his breach of that duty must have caused the damage complained of. Strictly then, in the determination of negligence, the duty question precedes all others, for negligence cannot be committed 'in the air'.[11] The existence of a legal duty is a pre-requisite to any question of breach or damage. But in the bulk of cases duty is seldom discussed because usually it is not in issue; its existence is so clear that it is taken for granted and it goes by default.[12] In the problem cases however, when it is raised and canvassed, the difficulties underlying the concept emerge.[13] Some of these difficulties are created, and others exacerbated, by differences in usage.

Broadly speaking the courts use 'duty' in two ways.[14] Frequently they fuse the theoretically distinct elements of duty and breach by incorporating into the former a specific standard of care demanded in the actual circumstance. In this way duty is tied closely to the particular facts, or to a very narrow category of facts. On other occasions they employ it to describe the *general relationship* necessary between the parties before liability can attach, discussion of the particular facts being reserved for

[6] (1970) 119 C.L.R. 397, 400. The court was of the opinion that at the time of the accident the plaintiff and the defendant were *jointly* engaged in a breach of Section 81(2) of the *Crimes Act* (Victoria) in that they were using a motor vehicle without the consent of the owner.

[7] *Ibid.*

[8] *Ibid.* 403 *per* Kitto J., 419 *per* Windeyer J., 425 *per* Owen J., 433 *per* Walsh J.

[9] See, for instance, Windeyer J. at p. 424 and Walsh J. at p. 429.

[10] See the interesting and valuable discussions in *Clerk and Lindsell on Torts* 13th ed. (London, Sweet & Maxwell, 1969) 458-75 and *Winfield and Jolowicz on Tort* 10th ed. (London, Sweet & Maxwell, 1975) 45-60.

[11] *LeLievre v. Gould* [1893] 1 Q.B. 49.

[12] See the short discussion in Gregory and Kalven, *Cases and Materials on Torts* (Barton, Little Brown 1969), 260.

[13] For instance *Dorset Yacht Company v. Home Office* [1970] A.C. 1004.

[14] H. Street, *The Law of Torts* 5th ed. (London, Butterworths, 1972) 101-2.

the question of breach. But the position must not be overstated. Between the two extremes there is a continuum over which the decisions of the courts range. The differences are essentially differences of degree. Duty concerns categories of facts and the narrower the categorization the more particular the duty.[15] At the extremes though the differences are very marked.

The most obvious practical effect of this distinction is in the determination of whether a duty of care exists. In the former case no general criterion is to be found; one looks to the particular decisions of the courts to see whether they have previously held a duty of care to arise in similar circumstances, to see whether on its particular facts it is covered by authority. By contrast, when used in the second mentioned sense, the courts have tended to employ, as the touchstone of duty, the notion of foreseeability, so that, as a general rule, a legal duty is presumed to be owed only to persons who ought to be foreseen as likely to suffer injury by a failure to exercise reasonable care. Fundamentally the difference between the two usages is the level of abstraction at which the duty is stated. In one its content is particularised while in the other it is not.

Of the two broad approaches the second is now more commonly preferred. As Lord Reid observed in *Dorset Yacht Company v. Home Office*, over the years there has been a

> Steady trend towards regarding the law of negligence as depending on principle so that, while foreseeability of harm does not always give rise to a duty relationship we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.[16]

The duty concept of course has been criticised as being tautologous, a fifth wheel in the theory of negligence.[17] Indeed Atiyah recently condemned it as 'an unnecessary abstraction which adds nothing to the substance of the law . . . simply [being] coextensive with the boundaries of liability once negligence in fact and damage in fact have been shown'.[18] Superfluous or not however, it would seem to have become, for the Judges at least, an indispensable part of the negligence issue.[19]

But what are the considerations which *underlie* duty, for clearly there are many situations involving foreseeable risks where very often no duty arises, for instance in nervous shock and economic loss? This is so only because the determination of the existence and the scope of a defendant's

[15] See *Hargrave v. Goldman* (1963) 110 C.L.R. 40, 64-5.
[16] [1970] A.C. 1004, 1027.
[17] Buckland, 'The Duty to Take Care' (1935) 51 *Law Quarterly Review* 637. See also Winfield, 'Duty in Tortious Negligence' (1934) 34 *Columbia Law Review* 41, and Stone J. *Legal System and Lawyers' Reasonings* (1964) 258-60.
[18] Atiyah, P. S. *Accidents, Compensation and the Law* (1970) 47.
[19] See the remarks by Windeyer J. in *Smith v. Jenkins* (1970) 119 C.L.R. 397, 418. And in *Hargrave v. Goldman* (1963) 110 C.L.R. 40, 63: 'The concept of a duty of care, as a prerequisite of liability in negligence, is embedded in our law by compulsive pronouncements of the highest authority.' It was to this habit of mind that Atiyah was referring when he commented upon '. . . the extraordinary hold which legal concepts acquire on the minds of lawyers'. Atiyah, *op. cit.*, 46.

duty to any plaintiff is essentially a question of policy.[20] Until the law acknowledges that a particular interest or relationship is capable of attracting legal protection, foresight of harm is of no significance.

In the duty question then, foreseeability of risk is only one of several factors that must be taken into account. As a leading American academic writer has commented '[It] . . . carries only an illusion of certainty in defining the consequences for which the defendant will be liable'.[21] Any inquiry into duty is better directed to the various factors which are incorporated into the courts' *conclusion* that on the particular facts a duty of care does or does not exist.[22]

In short, although 'duty' may be subject to different usages, it has but one purpose — the limitation of liability. As Lord Denning pointed out in *Dorset Yacht Company v. Home Office*,[23] 'This talk of "duty" or "no duty" is simply a way of limiting the range of liability for negligence'. It is a control mechanism which, unless seen as such, confuses by concealing policy decisions and value judgments behind an outwardly objective facade.

(iii) *Smith v. Jenkins in the High Court: The Judgments*

The court unanimously held, in *Smith v. Jenkins*,[24] that, in the particular circumstances, the plaintiff failed because he could not estab-

[20] See, for instance, Atiyah, *op. cit.* 45-93. American writers have been more generally prepared to emphasise this, e.g. see footnote 21 below. Similarly American (both United States and Canadian) Courts; see *Amaya v. Home Ice, Fuel and Supply Co.* 379 P. 2d 513; and *Nova Mink v. T.C.A.* [1951] 2 D.L.R. 241, 255-6, *per* MacDonald J.: 'When upon analysis of the circumstances and application of the appropriate formula, a Court holds that the defendant was under a duty of care, the Court is stating as a conclusion of law what is really a conclusion of policy as to responsibility for conduct involving unreasonable risk. It is saying that such circumstances presented such an appreciable risk of harm to others as to entitle them to protection against unreasonable conduct by the actor. . . . Accordingly there is always a large element of judicial policy and social expediency involved in the determination of the duty-problem, however it may be obscured by use of the traditional formulae'. See also *Rondel v. Worsley* [1969] 1 A.C. 191, but contrast the remarks of Kitto J. in *Rootes v. Shelton* (1966) 116 C.L.R. 383, 386-7 in which that judge expressed his dissent from the 'fashion' of talking in terms of judicial policy.

[21] Prosser W. L., 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1, 19. Note also Lord MacMillan in *Glasgow Corporation v. Muir* [1943] A.C. 448, 457: 'It is still left to the judge to decide what, in the circumstance of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen . . . what to one judge may seem farfetched may seem to another both natural and probable.' And the remarks by Windeyer J. in *Da Costa v. Cockburn Salvage and Trading Proprietary Ltd* (1970) 124 C.L.R. 192, 206-7, and 210-1. 'Foresight' more often than not is in fact 'hindsight'.

[22] See Prosser W. L., *Handbook of the Law of Torts* 4th ed. (1971) 325-6: 'It [duty] is a shorthand statement of a conclusion, rather than an aid to analysis itself . . . it should be recognized that 'duty' is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is [or is not] entitled to protection.'

[23] [1969] 2 Q.B. 412, 426 *per* Lord Denning M.R. Seen as such the question of public policy becomes 'On whom should the risk of negligence fall'.

[24] (1970) 119 C.L.R. 397.

lish a cause of action. That finding was based on a conclusion that the parties did not stand in a duty relationship *because* the plaintiff's conduct was unlawful.

Smith v. Jenkins was not the first occasion on which a court had suggested that a plaintiff's illegal conduct went to the question of duty. In *Hillen v. I.C.I.*[25] the English Court of Appeal had adopted substantially the same approach. While working on a barge in a manner which was in breach of the Docks regulations, the plaintiff, a dock worker, was injured. He sued the owners of the barge for negligence. In delivering judgment Lord Justice Scrutton held that the unlawful act of the plaintiff prevented any duty of care from arising between the parties.[26]

Again, in the High Court of Australia, in *Henwood v. The Municipal Tramways Trust*,[27] McTiernan and Dixon JJ. had stated, in passing, that many duties arose out of relations which could not subsist when one of the parties was a wrong-doer or engaged in an illegality. But both judges were there referring specifically to cases involving occupiers' liability. There is nothing to suggest that their remarks were intended to extend to situations outside the long established areas to which they were at that point alluding.

Stronger support for the duty approach is to be found in *Christiansen v. Gilday*[28] and the Canadian case of *Dunluk v. Birkner*.[29] In both of these instances a plaintiff's unlawful conduct was held to have negated a duty of care. Finally while it is true that some mention of the matter was also made in *Godbolt v. Fittock*,[30] there the New South Wales Supreme Court based its denial of a remedy upon the principles embodied in the maxim *ex turpi causa non oritur actio.*

There was, therefore, nothing particularly novel about the general approach adopted in *Smith v. Jenkins*. The decision, however, *is* open to criticism because of the way in which the duty concept was used to enable the court to avoid having to argue out the real issues. Duty in negligence is an involved and complex element in which many factors interplay, and unless they are articulated a decision couched in terms of duty is seldom very informative. An examination of the several judgments in *Smith v. Jenkins* illustrates this.

Barwick C.J. and Owen J. contended that, as between the parties, there was no duty of care because they were not neighbours.[31] They were not

[25] [1934] 1 K.B. 455.
[26] *Ibid.* 467, '[The] illegality of the operation . . . known as it was to the plaintiffs, prevents any duty on the barge owners other than that to abstain from doing acts to injure the stevedores in doing their work.' His duty not to intentionally or recklessly injure was thus analogous to the occupier's duty to trespassers.
[27] (1938) 60 C.L.R. 438, 465.
[28] [1948] S.R. (N.S.W.) 352.
[29] [1946] 3 D.L.R. 172.
[30] [1963] N.S.W.R. 22, 33.
[31] (1970) 119 C.L.R. 397, 400 *per* Barwick C.J.; 425 *per* Owen J.

neighbours because they did not *relevantly* stand in the relationship of driver and passenger. But this is hardly very helpful. Whatever the nature of their conduct the parties were certainly travelling as passenger and driver.

Owen J. was at pains to point out the difficulty, not to say the absurdity, of determining the standard of care appropriate of a prudent criminal.[32] As an objection this has more force where the activity is of the kind he chose to cite, namely safe-breaking and murder, than where the question relates to careless driving albeit in a stolen car. This becomes even more obvious when the offence involved is no more than driving without a licence or without compulsory third party insurance.[33] His analogies leave one with the distinct impression that they were chosen merely in order to support a particular conclusion. Crimes differ in kind and quality and it is simply not true that all have the effect of disentitling an offender from a civil remedy. The statute and case law concerning injuries arising out of breaches of industrial legislation well illustrates this point.[34]

He further contended that because a claim in contract could not lie it would therefore be illogical to permit a remedy in tort.[35] But Luntz has made the point that this does not in itself answer the problem.[36] Different considerations might properly apply between different branches of the law when the aim of one is the enforcement of promises reasonably relied upon while the aim of the other is compensation for harm done by wrongful careless acts. Owen J.'s reasons simply will not do.

Kitto J. conceded that the parties were neighbours (in the *Donoghue v. Stevenson* sense) — the necessary physical relationship of proximity between them being fulfilled — but, he argued, neighbour is not a word with any legal content.[37] The plaintiff failed not because the illegality prevented the creation of a relationship normally the source of a duty of care, but because of the existence of a general principle of law that 'persons who join in committing an illegal act which they know to be unlawful . . . have no legal rights *inter se* by reason of their respective

[32] *Ibid.* 425.

[33] See *Matthews v. McCullock* [1973] 2 N.S.W.L.R. 331 and *Andrews v. Nominal Defendant* (1965) 66 S.R. (N.S.W.) 85. It is interesting to note that Jacobs J. of the High Court adverted to this same point in the very recent case of *Progress and Properties Ltd v. Craft* 12 A.L.R. 59, 73: 'Where there is a joint illegal activity the actual act of which the plaintiff in a civil action may be complaining as done without care may itself be a criminal act of a kind in respect of which a court is not prepared to hear evidence for the purpose of establishing the standard of care which was reasonable in the circumstances. A court will not hear evidence nor will it determine a standard of care owing by a safe blower to his accomplice in respect of the explosive device. *This is an example which gives no difficulty, but other cases can give difficulty in classification.*' (Emphasis added.)

[34] See, for instance, *Progress Properties Ltd v. Craft* 12 A.L.R. 59. I owe much of the above paragraph to Professor C. Howard.

[35] *Ibid.* 426.

[36] Case-note on *Smith v. Jenkins* in (1970) 44 A.L.J. 281-2.

[37] *Smith v. Jenkins* (1970) 119 C.L.R. 397, 402.

participations in that act'.[38] He argued that the principle did not rest upon any assumption of risk but upon 'the legal inseverability, for purposes of responsibility, of the act which several persons knowingly contribute to in the joint commission of a wrong'.[39] But that principle is a principle for the purposes of *criminal*, not civil responsibility. It is surely inappropriate to argue matters of civil liability on the basis of a rule designed for other purposes.

The leading judgment was delivered by Windeyer J. With his detailed reasons several members of the court expressed general agreement.[40] The gist of his argument was that the special relationship between the parties negated any duty of care. As he put it, 'If a special relationship be in some cases a prerequisite of a duty of care it seems to me that in other cases a special relationship can exclude a duty of care'.[41]

He too perceived a principle of law of which *Smith v. Jenkins* was but one illustration. Given particularity for the case at hand, that principle was that 'If two or more persons participate in the commission of a crime, each takes the risk of the negligence of the other or others in the actual performance of the criminal act'.[42] He conceded that a right of action was not denied in every case that, on the face of it, fell within that general principle, but he argued that those cases were to be regarded as exceptions and treated accordingly.[43]

The stratagem his argument employed is common enough, but interesting nonetheless. In law it is always the anomaly, and not the rule, which cries out to be explained. By characterising troublesome cases as anomalies, attention is removed from the 'rule', albeit a rule applicable only to special situations, and focussed on those 'exceptions'. In this way the burden of argument and explanation moves from the suggested rule to those cases described as being not consistent with it. The existence of an even broader principle to which the suggested 'rule' is itself an exception calling for justification and definition is thus made to assume less apparent significance.

As to the scope of the 'no duty' special relationship and the reasons for it Windeyer J. provided little guidance. Ultimately his judgment is authority for little more than the narrow category of facts before him, and this is as he intended:

> The problem is circumscribed by the facts. It is not a wide ranging general discussion of the bearing that unlawful conduct has on liability in tort. It is whether when two persons are jointly engaged in a particular criminal enterprise — unlawfully taking or using a motor car — one can sue the other because he has been negligent in the course of carrying out his part in the unlawful undertaking.[44]

[38] *Ibid.* 403.
[39] *Ibid.* 404.
[40] *Ibid.* 400 *per* Barwick C.J.; 425 *per* Owen J.
[41] *Ibid.* 418.
[42] *Ibid.* 422.
[43] *Ibid.*
[44] *Ibid.* 416-7.

Although Walsh J., more realistically it is suggested, saw the dispute as simply one example of a more general problem concerning the circumstances in which the law gives no right of action to a person injured whilst engaged in unlawful acts,[45] he refused to be drawn into detailed discussion of that general problem. Instead he based his decision on the narrower rule that the law gives no right of action in negligence 'in respect of the carrying out by one of the participants in a joint criminal enterprise of the particular criminal act in the commission of which they are engaged'.[46]

In *Smith v. Jenkins* then, the High Court denied a remedy by doing little more than denying the existence of an obligation to which the law gives recognition. But, as Prosser has remarked in a different context, 'These are shifting sands and no fit foundation. There is a duty if the Court says there is a duty; the law . . . is what we make it. *Duty is only a word with which we state our conclusion that there is or is not to be liability: it necessarily begs the essential question.*'[47]

Of course a bald denial of the existence of a legal duty has the advantage, for the Courts at least, of minimising the awkwardness of precedent by particularising the content of the duty to the facts of each case, thus leaving unstated the general position and the policy grounds for the decision. By subsuming the unlawfulness into the question of duty a court is able to avoid defining the nature and limits of the illegality defence, rather less conspicuously than in a decision explicitly based upon the maxim *ex turpi causa non oritur actio.*

The law of tort well illustrates the dangers of pitching rules at too high a level of abstraction; generalisations are very frequently misleading. At the same time however, the cases suggest that only exceptionally does negligently inflicted physical injury go uncompensated, especially in road accident situations.[48] These exceptions need to be explained and justified, and the duty concept without more does neither.

But not only does the duty approach as used in *Smith v. Jenkins* leave unarticulated the real grounds of decision, it has major doctrinal weaknesses. An obliging motorist who unwittingly gives a lift to an escapee apparently owes that escapee a duty of care while another party who does so with full knowledge of the circumstances does not.[49] That the

[45] *Ibid.* 428-9.
[46] *Ibid.* 433.
[47] 'Palsgraf Revisited' (1953) 52 *Michigan Law Review* 1, 15. The High Court of Australia continues to persist with the duty formulation: '*A plea of illegality in answer to a claim of negligence is a denial that in the circumstances a duty of care was owed to the injured person* . . . An illegal activity adds a factor . . . which may either extinguish or modify the duty of care otherwise owed.' *Progress Properties Ltd v. Craft* 12 A.L.R. 59, 73 *per* Jacobs J. (Emphasis added.)
[48] See Atiyah, *op. cit.*, 48-9.
[49] This conclusion would seem to follow from the remarks of Kitto J. in *Smith v. Jenkins* (1970) 119 C.L.R. 397, 403.

issue should be made to turn upon the defendant's state of mind can often produce results which seem manifestly unjust.

The contradictions to which the duty formulation gives rise, especially in situations outside joint illegal enterprises, undermines its credibility. It is to the considerations which influence decisions and to the principles underlying them that attention is better directed.

2. THE RELATIONSHIP BETWEEN THE ILLEGAL CONDUCT AND THE NEGLIGENCE

As an answer to negligence the plaintiff's unlawful act has been traditionally treated by United States Courts as a question of causation.[50] Indeed one early commentator felt able to write that 'The whole controversy is as to what acts are to be considered causes and what mere conditions'.[51]

Outside the United States however, although few courts have disputed the importance of the relationship between the illegal conduct and the injury, none have elevated the doctrine of causation to the same position of pre-eminence.

Why has the American position not been followed? As an answer it is almost enough to illustrate the absurdities to which, carried to its extreme, the doctrine leads. Massachusetts cases involving the Sunday observance law are notorious.[52] In *Bosworth v. Swansey*[53] for instance the plaintiff, who was injured as a result of a defective highway, was precluded from recovering from the highway authority because his injury arose from his driving upon the highway on Sunday; while in *Lyons v. Desotelle*[54] a plaintiff who had ridden his horse on Sunday and tied it up at the edge of the road was precluded, for the same reason, from recovering from a defendant who negligently drove into the standing horse.

(i) *Causation and Policy*

By reducing the problem to causation — to distinctions between *causa causans* and *causa sine qua non* — courts have often found themselves

[50] Harold Davis, 'The Plaintiff's Illegal Act as a Defence to Actions of Tort' 18 *Harvard Law Review* 505.

[51] *Ibid.*

[52] In typical fashion Glanville Williams summarised the criticisms in the following manner: 'The notion that it is an effective riposte in tort to show that the plaintiff was a wrongdoer should long ago have been killed by the arguments of Sir Frederick Pollock; but it has lingered on in some cases, aided by oft-repeated maxims like *'ex turpi causa non oritur actio'*. In some American jurisdictions the blind application of this maxim has debarred plaintiffs who violate statutes against Sunday travelling from suing for injuries received in the course of such travelling, and has similarly outlawed plaintiffs who operate a car without a licence. The weight of opinion is against these cases even in America, and for English courts they stand for nothing save a warning'. *Joint Torts and Contributory Negligence* (1951) 333. His remarks on the subject have been much quoted by academic commentators and judges alike.

[53] (1945) 10 Met. (Mass.) 363.

[54] (1878) 124 Mass. 387.

dealing more in words than ideas.[55] There is a limit to the usefulness of the notion of causation in law, for legal inquiry is less concerned with 'ultimate explanations' than it is with attributing responsibility for the purpose of fixing liability.[56] From a range of causes-in-fact the law abstracts one as relevant 'not perhaps on the grounds of pure logic but for practical reasons'.[57]

Thus cause is not the same for law as for science or philosophy. But that is not to say that often the 'cause-in-fact' inquiry does not seem, without more, to answer the question of legal liability. Frequently it does — for instance *Philips v. Whiteley*[58] — but only because in some sequences of events both law and science (or philosophy), for their very different purposes, selectively attach causal significance to the same occurrence. However to conclude from this an identity between cause-in-fact and cause-in-law, is to be led into serious error. The two concepts of causal relationship, of connection between conduct and its consequence, are quite different.

This is most marked where outcomes seem best described as fortuitous or exceptional. For instance, *Smith v. Jenkins*[59] involved the theft of a car which was carelessly driven and subsequently involved in an accident. About the sequence of events there was no real dispute and yet opposing counsel argued that it involved a problem of causation. At first glance that problem appears to be one of fact. The question of whether the negligence was a *consequence* of the theft seems to be a factual inquiry. In reality however, in the very asking of it the process of attributing responsibility in law is well advanced. As an inquiry it has more a 'what-to-do-about-it-in-law' than a 'what-happened-in-fact' quality to it.[60]

But even if it be accepted that 'legal cause' investigations are attributive and quite different in purpose (and therefore nature) from scientific or philosophical causal inquiries there is little agreement as to precisely *how* one goes about the business of attributing responsibility. There would seem to be as many theories as inquirers: 'equivalence', 'efficiency', 'direct consequence', '*novus actus*', 'risk' and 'adequacy' are but a few listed by Hart and Honoré in *Causation and the Law*.[61]

Although the courts most commonly employ the concept of foreseeability in their 'explanations' of legal cause, in academic circles that

[55] The phrase is Mr Justice Windeyer's from his judgment in *Uren v. John Fairfax* (1966) 117 C.L.R. 118, 152.

[56] See *National Insurance Co. of New Zealand Ltd v. Espagne* (1961) 105 C.L.R. 569, 591-5 *per* Windeyer J. for an excellent discussion of this point.

[57] *Liesbosch, Dredger v. S.S. Edison (Owners)* [1933] A.C. 449, 460 *per* Lord Wright.

[58] [1938] 1 All E.R. 566.

[59] (1970) 119 C.L.R. 397.

[60] See Morris, C. Book Review in (1962) 29 *The University of Chicago Law Review* 606, 607.

[61] Hart, H. L. A. and Honore, A. *Causation and the Law* (1959). What follows purports to be nothing more than a sketchy summary of the thesis put forward by the authors. Naturally it cannot do justice to their elaborate discussion.

particular theory is now widely regarded as a 'straw man' hardly worth the effort of contraverting, and, in those circles at least, it has fallen into disrepute.[62] In practice even the courts rarely characterise physical injury as unforeseeable.

Hart and Honoré suggest that 'cause', as used in the law, bears a commonsense, as against a rigorously scientific or philosophical, meaning.[63] By it is not meant that, but for the presence of A, B would not have occurred. Rather it is employed to highlight the factor or factors seen as having made the difference sequentially between the normal and the abnormal. The type of explanation sought is not a complete or exhaustive listing of a set of necessary conditions, but the selection, from that set, of one (or more) which is then taken as *the* cause.

Moreover, and even a cursory review of the cases strongly suggest this to be so, 'cause' is usually attracted to and characterised by action, by movement, by doing. It is tested against and contrasted with the expected and the usual, but it is limited by the extraordinary — the mere coincidence — which in turn suggests the presence of another factor possessing the same sort of characteristics distinguishing cause from condition. This 'common sense' approach may well be scientifically unsound but in practical terms it seems to have won, until recently at least, a general acceptance among the legal fraternity.

Nonetheless, helpful as such analyses might, on occasions, appear to be, there has been an increasing belief that they cannot provide a satisfactory explanation of attributive inquiries in law and that it is 'a mistake to assume that the use of causal conceptions in ordinary speech always rests on intuitive ideas of justice derived from notions about the ascription of responsibility for events'.[64]

Professor Leon Green has argued that the 'causal relation issue' has become overburdened with unstated considerations that are inappropriate to the simple question of whether the defendant's conduct contributed to the plaintiff's injury.[65] As this suggests causation as used by the courts, it can only be understood if it too is seen as embodying issues of policy which are usually left unarticulated. As with duty, discussions of cause often obscure those policy factors which in reality underlie the decision. But, as one English academic authority has warned,[66] it is misleading to conclude from this that in practice the courts consciously decide on the basis of policy issues and then justify those decisions under the rubric of causation.[67] The submergence of policy factors is not complete although

[62] See, for instance, Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 267-70. Payne D. J., 'Foresight and Remoteness of Damage' (1963) 25 *Modern Law Review* 1.
[63] Hart and Honore, *op. cit.*, Chapters 1-2 *passim.*
[64] Atiyah, *Accidents, Compensation and the Law* (1970) 133.
[65] *The Litigation Process in Tort* (1965) 543-76.
[66] Atiyah, *op. cit.*, 137.
[67] Many decisions may well be the result of 'gestalt perceptions' by judges, but it is not possible, it is suggested, to treat the processes by which they reach decisions as being mutually exclusive. In different cases (and with different judges)

'usually they live a furtive life, half hidden by causal discussions and allowed into the limelight only rarely and briefly'. But, 'from time to time . . . they emerge and are seriously discussed'.[68]

Instances of judicial candour are becoming more common, and *Spartan Steel and Alloys Limited v. Martin*[69] is an outstanding recent example. There Lord Denning M.R., in describing the difficulty of pigeon-holing cases into appropriate legal categories in order to limit liability, was moved to comment:

> Sometimes I say: 'there was no duty'. In others I say 'the damage was too remote'. So much so that I think the time has come to discard these tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy . . . the loss should be recoverable.[70]

Relatively rare as such judicial boldness might be, the *Spartan Steel and Alloys* case underlines more effectively than any detailed academic analysis the casuistry of relying upon 'mystical legal formulae',[71] like duty and causation, to provide satisfactory explanations for the ascription or denial of liability, especially in difficult cases, and those involving the illegality defence have tended to be difficult cases *par excellence*.

(ii) *The Cases: Causation v. Proximity*

Turning to the cases it is clear that there have been differences in their treatment of the nature of the relationship between the unlawfulness and the negligence needed to establish a defence of 'illegality'.

The American emphasis on *directness* of connection had been discussed by Dixon and McTiernan JJ., rather inconclusively, in their joint judgment in *Henwood v. Municipal Tramways Trust (S.A.)*,[72] but they decided the case on other grounds. It was not until *Sullivan v. Sullivan*[73] that the matter came squarely into focus. Adopting Lord Asquith's remark, made in *The National Coal Board v. England*,[74] that 'the negligent act must . . . at least be a step in the execution of the common illegal purpose', the Court concluded that, in order for the defence to be made out, the defendant had to show 'a definite and plain causal connection between the criminal act and the negligence . . . alleged and complained of'.[75]

different processes may operate to produce decisions. Brett puts the position much too strongly if he is asserting that 'gestalt' explanations are the only accurate explanations of judicial behaviour. See Brett P. *An Essay on a Contemporary Jurisprudence* (1975) 50-4.

[68] Atiyah, *op. cit.*, 137.
[69] [1973] Q.B. 27.
[70] *Ibid.* 37.
[71] The phrase is Leon Green's, *op. cit.*, 563.
[72] (1938) 60 C.L.R. 438.
[73] (1962) 79 W.N. (N.S.W.) 615.
[74] [1954] A.C. 403.
[75] *Ibid.* 429.

It was in *Godbolt v. Fittock*[76] that causal nexus was first rejected as a necessary condition of the defence. Both plaintiff and defendant were parties to the stealing of sheep. While transporting the stolen animals to market their vehicle ran off the road and the plaintiff/passenger was injured. The defendant/driver successfully raised the defence of illegality (specifically *ex turpi causa non oritur actio*).

The Court held that the defence did not require a causal connection between the crime and the injury. The condition was satisfied if the connection was direct 'in a relative rather than absolute sense'.[77] As Sugerman J. put it, 'the question is one of sufficiency of the connection to require a conclusion that it would be contrary to public policy that damages should be awarded for the injury'.[78]

For the purposes of argument both Manning J. and Sugerman J. were prepared to ignore the question of whether, in using the vehicle, the parties were still in the course of stealing the sheep or of committing some other criminal offence.[79] They proceeded to base their decision on the view that the earlier theft tainted certain acts performed subsequently, including the journey during which the injury occurred.[80]

These questionings of causation as it applied to *ex turpi causa* were echoed, although not relied upon, by Walsh J. in *Andrews v. The Nominal Defendant*.[81] They were given added weight by the decision of the Full Court of the Supreme Court of New South Wales in *Bondarenko v. Sommers*.[82] In the course of his judgment Jacobs J.A., speaking for the Court, indicated a 'preference' for expressing the relationship between the criminal act and the negligent act in terms *other than* causation.[83] While conceding its possible relevance in some circumstances he believed that in cases where both the plaintiff and defendant were jointly engaged in a criminal enterprise it was the relationship between the parties and not the question of causation which was crucial.[84]

With *Smith* v. *Jenkins*[85] the demise of the 'causal theory', if not complete, seemed assured. In the leading judgment Windeyer J. labelled as unsatisfactory all formulations 'by which the critical question is whether the unlawful act has a causal connection with the harm suf-

[76] [1963] N.S.W.R. 22. Lord Asquith had in fact alluded to the possible significance of this factor where he remarked that as between two burglars *proceeding towards* a planned burglary, an action in tort would lie for the stealing, by one, of the other's watch. This because 'the theft is totally unconnected with the burglary'; *National Coal Board v. England* [1954] A.C. 403, 429. But this, of course, is an *intentional* tort, not negligence.
[77] *Ibid.* 28.
[78] *Ibid.*
[79] *Ibid.* 33 *per* Manning J.; 25 *per* Sugerman J.
[80] *Ibid.*
[81] (1965) 66 S.R. (N.S.W.) 85, 95.
[82] (1968) 69 S.R. (N.S.W.) 269.
[83] *Ibid.* 275.
[84] *Ibid.* 275-6.
[85] (1970) 119 C.L.R. 397.

fered'.[86] The proper question, he insisted, was whether the harm arose from 'the manner in which the criminal act was done'. This was a matter of 'connection and relationship and involvement' for which 'the modern jargon of remoteness and proximity' was more useful. In this way the success of the defence of illegality he saw as dependent upon whether the negligence was so related to the unlawful conduct that the tort could be said to arise out of the crime.[87]

The court indicated that, whatever the general position, it was certainly the case that where the very act complained of as done negligently was itself the criminal act, the necessary connection was satisfied.[88] Both *Smith v. Jenkins* and *Bondarenko v. Sommers* fell within this description. In each instance the injury in point arose out of the illegal use of the motor vehicle.

Despite the obvious anxiety of the High Court[89] to limit their discussion to the fact situation in issue, it is somewhat surprising, in view of the attention they gave to the weakness of solutions based on causation and given the tenor of their criticisms, that an attempt should subsequently have been made to preserve that theory in 'unilateral *turpis causa*' situations. Such an attempt was made however in the recent case of *Matthews v. McCullock*,[90] but that was a decision at first instance by a single judge only and it is unlikely to see the causation formulation returned to favour. At this stage *Matthews v. McCullock* would be poor warrant for not treating as firmly renounced the particular form of inquiry which characterises the issue as one of cause and consequence only to be answered in the 'old jargon of scholastic logic'.[91]

Judicial doubts about the adequacy of causal language to describe the relationship necessary between the crime and the negligence or injury seem then to have crystallised in *Smith v. Jenkins*.[92] First outlined in the New South Wales Supreme Court by Sugerman J. in *Godbolt v. Fittock*,[93] the notion of 'sufficiency of connection' now seems to have been adopted by the High Court.[94] It sees an attempt to limit the availability of the defence of illegality to those consequences which have some reasonably close connection with plaintiff's unlawful conduct, and to the sort of harm which it appeared to threaten from the beginning, where this does not seem so unexpected as to be labelled extraordinary or merely coincidental.

[86] *Ibid.* 42.
[87] *Ibid.*
[88] *Ibid.* 424. See also The United States cases: *Meador v. Hotel Grover* (1942) 9 So. 2d 782, *Holcomb. v. Meads* (1952) 246 Pac. 2d 239.
[89] *Smith v. Jenkins* (1970) 119 C.L.R. 397; 416-7 and 423 *per* Windeyer J.; 433 *per* Walsh J.; 400 *per* Barwick C.J.
[90] [1973] 2 N.S.W.L.R. 331.
[91] *Smith v. Jenkins* (1970) 119 C.L.R. 397, 421 *per* Windeyer J.
[92] *Ibid.*
[93] [1963] N.S.W.R. 22.
[94] *Smith v. Jenkins* (1970) 119 C.L.R. 397, 419-22 *per* Windeyer J., in particular.

But 'proximity' provides no single universally applicable rule. As a concept it is neither neat nor precise. Its application is frequently difficult. Spatio-temporal considerations are important but not necessarily conclusive. In the final analysis the decision remains one of fact, but for all this it is a more satisfactory formulation than any rule based on causation.

Thus in both *Smith v. Jenkins* and in *Godbolt v. Fittock* the Court accepted that the facts did not support an argument from causation, there being simply no causal relationship between the commission of the crime and the commission of the tort. In both cases, however, it was concluded that the crime and the tort were sufficiently connected to give rise to a defence of illegality.

Other Australian cases where the defence has succeeded, for instance *Bondarenko v. Sommers*[95] and *Sullivan v. Sullivan*,[96] are also well enough explained by the more general and flexible notion of proximity without having to call into account strained causal concepts. In this context Sheppard J.'s attempt, in *Matthews v. McCullock*,[97] to preserve the causal requirement in cases of unilateral *ex turpi causa* was, it is suggested, misguided. The sensible and obvious justification for entertaining the plaintiff's action in those particular circumstances was surely that his unlawful conduct, although perhaps sufficiently proximate to the injury suffered, was simply not serious enough to warrant barring his claim. To explain it in terms of causation is both confusing and unnecessary.

The tendency to employ the language of causation has been, in large part, a result of its 'appropriateness', more apparent than real, in certain situations where the illegality defence has been open. Thus, attempting to escape apprehension by the police, with the attendant likelihood of accident, might well seem to be within the risk of 'illegal use':[98] similarly flight from the scene of a crime;[99] or illegally using a vehicle for the purpose of engaging in a dangerous activity, for instance, racing;[1] or driving while drunk, while impaired, or while drinking.[2] In all such cases to speak of a causal connection seems deceptively plausible, but unconvincing nonetheless, as Sugerman J. illustrated in *Godbolt v. Fittock*.[3] In any event these considerations are more consonant with the defence of *volenti non fit injuria* for, if anything they go to acceptance of risk, to proof that the plaintiff/passenger was *volens*.

[95] (1968) 69 S.R. (N.S.W.) 269.
[96] (1962) 79 W.N. (N.S.W.) 615.
[97] [1973] 2 N.S.W.L.R. 331, 335.
[98] *Schwindt v. Giesbrecht, Doe v. Doe* (1958) 13 D.L.R. (2d) 770, *Rondos v. Wawrin* (1968) 68 D.L.R. (2d) 658.
[99] *Jenkins v. Smith* [1969] V.R. 267, 269, *Tomlinson v. Harrison* (1971) 24 D.L.R. (3d) 26, 30, 32, *Godbolt v. Fittock* (1963) N.S.W.R. 22, 25.
[1] *Bondarenko v. Sommers* [1968] S.R. (N.S.W.) 269, 275, *Smith v. Jenkins* (1970) 119 C.L.R. 397.
[2] *Miller v. Decker* (1957) 9 D.L.R. (2d) 1, *Tallow v. Tailfeathers* (1973) 44 D.L.R. (3d) 55, 58, 68, *Foster v. Morton* (1956) 4 D.L.R. (2d) 269, *Shillabeer v. Koehn* (1975) 11 S.A.S.R. 397.
[3] [1963] N.S.W.R. 22, 25.

Moreover, because these formulations, in one way or another, all draw upon the *purpose* of the illegal enterprise (joint or unilateral), they can, and have, occasioned absurdities in judicial reasoning. Hence the Canadian cases in which the courts attempted to distinguish between 'drunk-driving' situations by relying upon the innocence of a journey whose object was the return of the parties to their homes as against, for instance, joyriding or a 'drunken carousal'.[4]

Nonetheless, and this point has already been made, despite the preferability of 'proximity' to 'cause' for the purpose of describing the relationship necessary between the crime and the tort, that concept alone does not pretend always to provide an easy solution or explanation. Situations can be envisaged in which the Courts would be faced with difficult decisions. Some of these have affinities with the criminal law problem of 'attempts'. For instance, although a burglar injured on his way to a 'professional engagement' might not be denied a remedy,[5] how far into the execution of the crime must he be in order that the condition of proximity be satisfied?

Naturally enough the question of connection is most likely to arise in situations where the harm is suffered during or after the commission of an offence. Thus, changing the facts in *Smith v. Jenkins*,[6] what would the position have been if neither the particular plaintiff nor the particular defendant had been present or taken part in the actual stealing of the car but had instead been invited, some time after the theft, to travel in the vehicle and take a turn at the wheel (even knowing or suspecting the vehicle to have been stolen)? Would a passenger guilty of illegal use in this sense have been barred from recovering damages? What if the circumstances disclosed negligent but not reckless driving? And what if the accident had occurred several days later and/or many miles away from the scene of the crime?

Again, what if in *Godbolt v. Fittock*[7] the stolen sheep had been left to graze for some days on the thieves' property before the fateful journey had been undertaken? Would the driving still have been tainted by — sufficiently connected with — the crime? Quite probably the Court might then have relied more upon 'possession' or 'asportation'. But what if *most* of the sheep being trucked to market had been lawfully owned by the parties, or if the driver of the truck had been an innocent party unaware of the theft?

Difficult situations like these could be multiplied *ad infinitum*. Proximity is not a panacea which makes simple the complex, but in explaining the

[4] See *R. v. Harder* (1947) 2 D.L.R. 593 and *Foster v. Morton* (1956) 4 D.L.R. (2d) 269, 283.
[5] *Henwood v. M.T.T. (S.A.)* (1938) 60 C.L.R. 438, 446 *per* Latham C.J.
[6] (1970) 119 C.L.R. 397.
[7] (1963) N.S.W.R. 22.

cases it is a more useful notion than cause. What is more, it is only one of several factors which are considered before a decision is reached. Ultimately the question must turn upon the facts of each individual case. The cases do seem, nevertheless, to support some positive, if particularised, conclusions, at least where the offence or the negligence involves motor vehicles. From the observations made in *Smith v. Jenkins*[8] and *Bondarenko v. Sommers*[9] it would appear that road accident torts occurring whilst a car is being illegally used will always be sufficiently proximate to the offence and, indeed, will often result in the guilty parties being *caput lupinum*, at least where they participated in the actual taking of the vehicle. This is so despite the general remarks made in *Henwood v. Municipal Tramways Trust.*[10]

Similarly, harm suffered during the commission of offences like drunken driving, or some forms of dangerous driving (e.g. racing), will almost certainly always be regarded as sufficiently connected with the crime, but then the matter turns more upon the nature and circumstances of the offence, and it is to this aspect of the question that attention will now be directed.

[8] (1970) 119 C.L.R. 397.
[9] (1968) 69 S.R. (N.S.W.) 269.
[10] (1938) 60 C.L.R. 438, 446, *per* Latham C.J.; 460 *per* Dixon and McTiernan JJ.